

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Section 309(j)) PP Docket No. 93-253
of the Communications Act)
)
Competitive Bidding)

SUPPLEMENTAL COMMENTS OF
JOHN G. ANDRIKOPOULOS, BENT ELBOW CORPORATION,
KENNETH B. BLAIR, ROBERT B. BLOW, BILLY T. CAMPBELL,
JUDITH CAMPBELL, IMRE F. DANCs, EQUINUNK CELLULAR
PARTNERSHIP, FOOTHILLS COMMUNICATIONS, G.P., WARREN R. HAAS,
BERTIE D. HEINER, HIGH HOPES GENERAL PARTNERSHIP,
THE JACOBS GROUP, MARK J. KINGTON, LONGVIEW CELLULAR
ASSOCIATES, MILWAUKEE PARTNERS, DAVID MIXER,
JAMES B. MURRAY, JR., OAK RIDGE COMMUNICATIONS, G.P.,
OMEGA CELLULAR PARTNERS I, P & G CELLULAR TELEPHONE COMPANY,
LORETTA C. PARKER, QUANTUM COMMUNICATIONS GROUP, INC.,
KATHLEEN R. SCHULTZ, FREDERIC W. SCOTT, JR.,
SHENANDOAH COMMUNICATIONS AND ASSOCIATES,
SHERWOOD CELLULAR PARTNERS, SIERRA VENTURES,
SOUNDS COMMUNICATIONS, SOUTHERN CELLULAR, TARHEEL CELLULAR,
VERMEL ENTERPRISES, INC., VISTA CELLULAR ASSOCIATES,
JERRY R. WEBB, WISCONSIN PARTNERS, AND ROBERT K. WOOD

John G. Andrikopoulos, Bent Elbow Corporation, Kenneth
B. Blair, Robert B. Blow, Billy T. Campbell, Judith
Campbell, Imre F. Dancs, Equinunk Cellular Partnership,
Foothills Communications, G.P., Warren R. Haas, Bertie D.
Heiner, High Hopes General Partnership, The Jacobs Group,
Mark J. Kington, Longview Cellular Associates, Milwaukee
Partners, David Mixer, James B. Murray, Jr., Oak Ridge
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Scott, Jr., Shenandoah Communications and Associates, Sherwood Cellular Partners, Sierra Ventures, Sound Communications, Southern Cellular, Tarheel Cellular, Vermel Enterprises, Inc., Vista Cellular Associates, Jerry R. Webb, Wisconsin Partners, and Robert K. Wood (hereinafter "Supplemental Commenters"), by their attorneys, hereby submit supplemental comments in the captioned docket.^{1/} Each of the Supplemental Commenters is a party that filed cellular unserved area applications at the Federal Communications Commission ("FCC" or "Commission") in accordance with the FCC's lottery allocation procedure, which has been halted pending the resolution of the issues addressed in these Supplemental Comments.

In this docket's Notice of Proposed Rulemaking ("Notice"),^{2/} the Commission requested comments on its proposal to use an auction, rather than a lottery, to grant licenses for cellular unserved areas for which lottery

^{1/} Supplemental Commenters hereby request leave to submit these Supplemental Comments in this matter to alert the Commission to two relevant Supreme Court cases decided April 26, 1994, long after the date that reply comments were due. Supplemental Commenters believe that Commission consideration of these two important decisions would allow for a speedy resolution to the suspended process of allocating licenses in cellular unserved areas, and therefore serve the public interest. Because Supplemental Commenters' comments merely point to matters of which the Commission should take official notice, and are being filed within 30 days of the issuance of the decisions, none of the parties to this proceeding would be prejudiced by Commission consideration of these comments.

^{2/} Notice of Proposed Rulemaking, Implementation of Section 309(j) of the Communications Act: Competitive Bidding, 8 FCC Rcd 7635, 7662 ¶ 160 (1993).

applications were accepted for filing prior to July 26, 1993, citing as statutory authority the Omnibus Budget Reconciliation Act of 1993 ("Budget Act").^{3/} Supplemental Commenters previously argued that doing so would unfairly and unreasonably apply a statute retroactively, attaching new legal consequences to events completed before its enactment.^{4/} Despite the fact that the comments and reply comments demonstrated an overwhelming opposition to the proposal to apply auctions retroactively to cellular unserved areas, the Commission in its Second Report and Order in this docket deferred a decision as to the applicability of competitive bidding to these cellular radio applications to a separate order.^{5/} It is now eight months after the first lotteries were supposed to be held, and these licenses remain ungranted, awaiting Commission action.

Less than one week after the Commission decided not to decide the issue, the Supreme Court released slip opinions for two cases that specifically deal with the issue of applying a statute retroactively: Landgraf v. USI Film

^{3/} Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993), codified at 47 U.S.C. § 309(j).

^{4/} See Comments of John G. Andrikopoulos, et al. in PP Docket No. 93-253 (November 10, 1993); Reply Comments of John G. Andrikopoulos, et al. in PP Docket No. 93-253 (November 30, 1993); Reply Comments of Kenneth B. Blair, et al. in PP Docket No. 93-253 (November 30, 1993).

^{5/} Second Report and Order, Implementation of Section 309(j) of the Communications Act: Competitive Bidding, PP Docket No. 93-253, FCC 94-61, at ¶ 60 & n.55 (April 20, 1994).

Products, No. 92-757 (April 26, 1994), and Rivers v. Roadway Express, Inc., No. 92-938 (April 26, 1994). Both cases further support Supplemental Commenters' argument that the Commission cannot retroactively apply its new statutory authority to assign licenses by auction to cellular unserved area applications already on file with the Commission for lottery as of July 26, 1993. In Landgraf, slip op. at 36, the Court held:

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. . . . When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would . . . impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

See also Rivers, slip op. at 4-5 ("[F]or reasons we stated in Landgraf, the important new legal obligations [the statute] imposes bring it within the class of laws that are presumptively prospective.").

As Supplemental Commenters have previously argued, imposing auctions on the lottery applicants clearly imposes new duties and legal obligations with respect to their completed applications. Since holding auctions for cellular unserved areas would apply the statute retroactively, the FCC must abide by the Court's traditional presumption that the statute does not govern absent clear congressional intent favoring such a result. The Budget Act contains no

express command giving the FCC this power to apply the statute retroactively, and in fact, deliberately forges an exception to the auction requirement for applications on file with the Commission prior to July 26, 1993.^{6/} Therefore, the FCC does not have the statutory authority to use an auction, rather than a lottery, to grant licenses for cellular unserved areas for which lottery applications were accepted for filing prior to July 26, 1993.

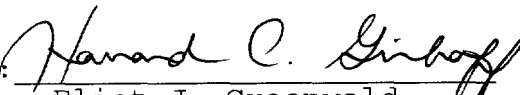
For the above stated reasons, Supplemental Commenters respectfully urge the Commission to respond to the judgments of the Supreme Court and, without further delay, serve the public interest by licensing cellular unserved areas by lottery in instances where the applications were on file with the Commission prior to July 26, 1993.

Respectfully submitted,

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^{6/} Budget Act § 6002(e), 107 Stat. at 397. Moreover, as Supplemental Commenters explained in their Comments, Congress originally considered requiring retroactive application of auction rules in the Budget Act, but deleted such application in the final version. See Comments of John G. Andrikopoulos, et al. at 6 (citing H.R. Rep. No. 111, 103d Cong., 1st Sess. 253, 262-63 (1993), reprinted in U.S.C.C.A.N. 378, 580, 589-90; 139 Cong. Rec. S7986, S7995 (daily ed. June 24, 1993)). The Landgraf Court, in concluding that the statute in question should not be applied retroactively, noted a parallel situation: an early version of the bill included provisions of retroactivity which were deleted from the enacted statute. Landgraf, slip op. at 10-11, 43. This provides further support that Congress did not intend the Budget Act's auction provisions be applied retroactively to prior-filed lottery applications.

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Dated: May 23, 1994

CERTIFICATE OF SERVICE

I, Renee Gray, a secretary to the law firm of FISHER WAYLAND COOPER LEADER & ZARAGOZA L.L.P., hereby certify that on this 23rd day of May, 1994, I served a true copy of the foregoing **"SUPPLEMENTAL COMMENTS"** by hand delivery, upon the following:

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